No. 76-814

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES WILLIAM CAMERON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 543 F. 2d 1002.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1976 (Pet. App. A). A petition for rehearing with a suggestion for rehearing *en banc* was denied on November 16, 1976 (Pet. App. C). The petition for a writ of certiorari was filed on December 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment right to counsel was violated when state police officers who did

not know that petitioner had been indicted by a federal grand jury for narcotics violations questioned him out of the presence of counsel about a kidnapping of which petitioner was the victim.

2. Whether evidence that petitioner failed to file income tax returns was properly admitted to show that he had no legitimate source for the monies he spent during the period of the narcotics conspiracy charged in the indictment.

STATEMENT

Following a ten-week jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to import, possess, and distribute heroin and cocaine, in violation of 21 U.S.C. 846.[1] He was sentenced to eight years' imprisonment, a special parole term of five years, and a $5,000 fine. The court of appeals affirmed (Pet. App. B).

1. The evidence adduced at trial revealed a massive, multi-tiered narcotics conspiracy operating from 1968 through 1975.[2] The conspiracy was responsible for the

[1]Seven co-defendants were also convicted of conspiracy, and some of them were convicted on related substantive charges as well. The sentences ranged from two to fifteen years' imprisonment. The court of appeals affirmed all the convictions except one, and this Court has denied certiorari petitions filed by three co-defendants: *Carter* v. *United States*, No. 76-582, certiorari denied, November 29, 1976; *Darby* v. *United States*, No. 76-5783, certiorari denied, January 10, 1977; *Bates* v. *United States*, No. 76-5823, certiorari denied, January 17, 1977.

Two other co-defendants pleaded guilty and five were acquitted by the jury. Three co-defendants, including Frank Matthews, are fugitives.

[2]The evidence is recounted in detail in the government's brief in the court of appeals (pp. 3-35), a copy of which is being lodged with the Clerk of this Court.

importation and distribution of huge quantities of heroin and cocaine; in 1971 alone, the conspirators distributed over 900 kilograms of narcotics (Tr. 2289-2317).[3] The central figure in this narcotics organization was Frank Matthews, who directed the importation of narcotics (largely from Venezuela), its processing at the organization's New York "cutting mills," and its distribution to major narcotics dealers in at least five States.

Petitioner participated in the conspiracy by receiving large quantities of heroin and cocaine from the organization and distributing the narcotics in North Carolina (Pet. App. 8a). Petitioner was seen at one of the organization's major narcotics "cutting mills" in New York (Tr. 495-497, 502-503, 508) and at a New York bar that served as a meeting place for members of the organization and wholesale narcotics buyers (Tr. 704-711, 772). On one occasion petitioner demonstrated the proper method of bagging heroin to one of Matthews' employees, from whom petitioner subsequently bought a package containing several ounces of heroin (Tr. 773-780). There was also evidence that at one point Matthews was unable to locate petitioner when he wanted to deliver heroin to him (Tr. 509-515, 656-657), that petitioner twice sent money to Matthews through an intermediary (Tr. 512-513, 521, 652-653), and that petitioner owed Matthews $50,000 (Tr. 4339-4340).

2. A sealed indictment was returned against petitioner in the instant case on January 29, 1975. On February 4, 1975, petitioner was abducted by Black Muslims, who demanded a ransom for his release (S. H. 251-252, 257-258, 264). The New York City Police established a

[3]"Tr." refers to the trial transcript. "S.H." refers to the transcript of the pre-trial suppression hearing. "G.A." refers to the government's appendix in the court of appeals.

"command post" at the apartment where petitioner's wife was staying, both to provide protection for the family and to monitor telephone calls for ransom demands.

The ransom was paid and petitioner was released on February 7, 1975. He went to the apartment, where he was met by police officers who described the efforts they had made on his behalf and persuaded petitioner to accompany them to the station house for a "debriefing" on the kidnapping (S.H. 208-209, 266-269).

Police Captain James Steproe was in charge of the kidnapping investigation and conducted the debriefing.[4] In relating the events of the kidnapping, petitioner made several statements about his previous activities in the narcotics trade.[5] Petitioner was questioned as the victim of a crime rather than as a suspect and accordingly was not given any *Miranda* warnings (S.H. 171). Captain Steproe did not know that a sealed indictment had already been returned against petitioner (S.H. 87, 184-185).

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[4]Prior to petitioner's release, Captain Steproe had been advised that petitioner's "drug background" was a possible motive for his abduction (S.H. 22). Several other police officers and an FBI agent involved in the kidnapping investigation (but not in the instant narcotics case) assisted Steproe in conducting the interview.

[5]Petitioner said that "[w]hen I was doing business [*i.e.*, in narcotics], I had what I paid them [the kidnappers] in my closet" and "[m]y wife could put her hand on it just like that"; that "when you are in drugs, man, a big one [and not a] street corner pusher * * * you got a network of so much information * * * "; that "[y]ou might think I'm a bad guy because I deal in drugs. I. I've sold drugs"; that he was familiar with extortion practiced upon drug dealers in Philadelphia; and that he believed that the narcotics trade was on the decline because "the guys that are in it are stuck in it, but there ain't no new guys coming in" (Tr. 4107-4121).

Steproe also did not know that, apparently as a result of his general directive to notify all intelligence units of petitioner's release (S.H. 100), two federal agents of the federal-state New York Drug Enforcement Task Force were present at the station house and were able to hear petitioner over a loudspeaker in another room. The agents did not, however, participate in the debriefing in any way (S.H. 391-392, 451-452). The debriefing interview was recorded (without petitioner's knowledge) and the tapes containing petitioner's statements regarding his involvement in narcotics trafficking were introduced into evidence at trial.

ARGUMENT

1. Petitioner, relying on *Massiah* v. *United States*, 377 U.S. 201, argues (Pet. 8) that the incriminatory statements made during the debriefing were obtained in violation of his Sixth Amendment right to counsel and therefore should not have been admitted into evidence. As the court of appeals correctly held, however, it would require a "distortion of the facts" of the present case to bring it within the *Massiah* rule (Pet. App. 31a).

In our view that rule applies only when law enforcement officials deliberately attempt, in defense counsel's absence, to elicit incriminating information about a crime from a defendant whose right to counsel in respect of that crime has already attached by virtue of the institution of judicial proceedings (such as the return of an indictment) against him. In *Massiah* itself, after the defendant had been indicted on narcotics charges and released on bail, federal agents arranged for an informant to elicit and secretly transmit to the agents stationed nearby inculpatory information concerning the crime that was the subject of the indictment. This Court held (377 U.S. at 206) "that the [defendant] was denied the basic

protections of [the Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which *federal agents had deliberately elicited from him* after he had been indicted and in the absence of his counsel" (emphasis added).

Brewer v. *Williams*, No. 74-1263, decided March 23, 1977, also indicates that *Massiah* applies only in cases of purposeful attempts by law enforcement officials to take advantage of the absence of defense counsel in questioning a defendant about a crime in respect to which the Sixth Amendment right to counsel has already attached. There the defendant, who was being sought in Des Moines, Iowa, in connection with the abduction of a child, surrendered and was arraigned in Davenport, Iowa, 160 miles away. The defendant was represented by counsel in both Des Moines and Davenport, and the Des Moines police officers who drove to Davenport to bring the defendant back promised both counsel that they would not question the defendant about the crime during the trip. In disregard of that agreement, however, one of the officers did interrogate the defendant, who in response directed the officers to the location where he had hidden the child's body.

In holding that the fruits of the interrogation were inadmissible, this Court observed that the officer had "deliberately and designedly set out to elicit information from" the defendant (slip op. 10), that no Sixth Amendment right to counsel "would have come into play if there had been no interrogation" (*id.* at 11), and that "[t]he circumstances of this case are thus constitutionally indistinguishable from those presented" in *Massiah* (*id.* at 11-12).

In the instant case, by contrast, petitioner's statements were not the result of a deliberate attempt by law enforcement officers to gain information for use against him in a subsequent trial on the narcotics charge, and therefore his

constitutional right to counsel never came into play and could not have been violated. Indeed, as both courts below found (Pet. App. 30a), Captain Steproe and the other participating officers did not even know that petitioner had been indicted. Their questioning of him as a recently released kidnapping victim was entirely reasonable, and any inculpatory information divulged by petitioner during that questioning was not subject to suppression simply because petitioner had been named in a sealed indictment. As the Second Circuit stated in *United States* v. *Garcia*, 377 F. 2d 321, 324, certiorari denied, 389 U.S. 991 (footnote and citations omitted):

> *Massiah* was * * * not aimed at all post-indictment evidence gathered by the prosecution, but at the narrow situation where, after indictment, law enforcement authorities have "deliberately elicited" incriminating statements from a defendant by direct interrogation or by surreptitious means. The rule does not apply to spontaneous or voluntary statements made by the defendant in the presence of government agents * * * or when the person hearing the statement is not a government agent at the time the statement is made. * * * Nor should it apply in a case in which the questioner was completely unaware of the existence of the indictment and was not seeking information about the crime the indictment charged had been committed. *Massiah* * * * only protects against deliberate efforts of law enforcement agents which are specifically aimed at eliciting incriminating statements relative to the crime under indictment. * * * Certainly in a case like this where the agent is unaware of * * * the existence of an indictment, he cannot be said to be deliberately eliciting a statement in violation of *Massiah*. * * *

See also *Grieco* v. *Meachum*, 533 F. 2d 713, 717 (C.A. 1) ("[I]f the circumstances of this case were that neither [of the agents] knew of the indictment pending against [the defendant], and inadvertently had been made aware of these incriminatory statements while pursuing other inquiries, we would be inclined to find that *Massiah* was not violated.").[6] Cf. *Procunier* v. *Atchley*, 400 U.S. 446, 447 n. 1.

If the federal agents who overheard petitioner's incriminatory remarks had participated in the questioning, or told or even suggested to Captain Steproe what questions

[6]The First Circuit has disagreed with the view that *Massiah* applies only when there has been a deliberate effort by law enforcement officials to elicit information about a crime for which the defendant has already been indicted. See *Hancock* v. *White*, 378 F. 2d 479, 482 (C.A. 1), holding that *McLeod* v. *Ohio*, 381 U.S. 356, reversing *per curiam* 1 Ohio St. 2d 60, 203 N.E. 2d 349, indicates that *Massiah* "applies to exclude post-indictment incriminating statements of an accused to government agents in the absence of counsel even when not deliberately elicited by interrogation or induced by misapprehension engendered by trickery or deception." The issue was not posed in *Brewer* v. *Williams*, *supra*, and accordingly we do not take the Court's citation of *McLeod* and *Hancock* in that decision (slip op. 12) as indicating approval of the First Circuit's position in this regard. Indeed, the Court's ruling that the protection of the Sixth Amendment right to counsel would not have come into play had there been no interrogation (*id.* at 11) indicates that the First Circuit's interpretation of *Massiah* was incorrect.

In any event, even assuming that the First Circuit would adhere to its position notwithstanding *Brewer* v. *Williams*, both *McLeod* and *Hancock* are nevertheless materially different from the present case. In those cases the defendant made incriminating statements, while he was in custody, to law enforcement officials who were fully aware that an indictment had already been returned. As *Grieco* v. *Meachum*, *supra*, indicates, the First Circuit would reach a different result where, as here and as in *United States* v. *Garcia*, *supra*, the officer who questioned the defendant had no knowledge that an indictment had already been issued.

to ask, then presumably the rule of *Massiah* would have been violated notwithstanding Steproe's ignorance of the indictment. But there is no evidence whatsoever that the federal agents (who knew that an indictment had been returned) were attempting to get the state officers to do what *Massiah* would have forbidden the federal officers from doing themselves. See S.H. 391-392, 451-452. It is true that Captain Steproe was aware that petitioner was involved in narcotics activity and that some of his questions of petitioner touched upon the subject of narcotics. But petitioner himself had volunteered that he was kidnapped by a Black Muslim organization that allegedly was responsible for similar kidnappings (and murders) of narcotics dealers (see, *e.g.*, G.A. 286-287, 292) and that allegedly had a list of 20 to 30 other individuals marked for future kidnapping (G.A. 294-296). It was therefore highly pertinent to the kidnapping investigation for Steproe to pursue a line of inquiry designed to discover information relating to the motives for the kidnapping, the identities of the kidnappers, their methods of operation, and the identities of their past and future intended victims. Captain Steproe was not engaged in a deliberate attempt to elicit information from petitioner for use against petitioner at trial on an indictment that Steproe did not even know had been returned, and accordingly the admission into evidence of petitioner's incriminating statements did not contravene *Massiah*.[7]

[7]Petitioner suggests (Pet. 10) that, since an attorney who had represented him in a prior state narcotics prosecution had telephoned the officers during the period of his captivity and advised them of this representation, the attorney "was entitled to be notified of the proposed interrogation of his client" (*ibid.*). But there is no indication that petitioner was that attorney's "client" in respect of a crime of which petitioner was the victim. Moreover, as we have shown above, petitioner's Sixth Amendment right to counsel never came into play in this case since he was not subject to interrogation in *Massiah*-type circumstances. Thus Captain Steproe's failure to

2. Petitioner states (Pet. 9) that the court of appeals' conclusion that his statements were voluntary "is open to question." We disagree for the reasons stated in the first instance by the district court (G.A. 89-90):

> First, with respect to his claimed inability to refuse to answer questions, the transcript shows that [petitioner] was logical, articulate, and responsive to the questions. It is obvious that he was fully aware of what he was saying and that he voluntarily and intentionally gave the answers. Although he was fatigued, the tape provides clear, consistent evidence of [petitioner's] ability to refuse to answer questions throughout the interview. [Footnote omitted.] [Petitioner] demonstrated that he was able to withhold information, thus indicating that making statements was a matter of conscious choice. [See, *e.g.* G.A. 397, 405-407, 419, 459-460, 490-494.]
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> * * * * *
>
> [Petitioner also] urges that his appearance at the precinct was compelled. Sgt. Santise appealed to [petitioner's] sense of decency and gratitude. To

notify an attorney who represented petitioner in an unrelated matter could not have deprived petitioner of any constitutional rights.

Petitioner's reliance (Pet. 10) on *United States* v. *Satterfield*, C.A. 2, No. 76-1372, decided December 7, 1976—holding that post-indictment statements must be suppressed unless the accused has made a knowing and intelligent waiver of counsel under the standards announced in *Faretta* v. *California*, 422 U.S. 806, 835—is misplaced. Although we think *Satterfield* was wrongly decided, we note that the Second Circuit itself distinguished that case from the present case, "where a defendant indicted by a federal grand jury made statements to New York police who were unaware that the defendant had been indicted" (slip op. 809 n. 1).

> that limited extent there was coercion. However, the tape provides a complete answer to the claim. Throughout the interview [petitioner] repeats the reasons why he agreed to talk to the police. He was grateful for what the police had done to help rescue him and to protect his family [G.A. 276, 417]. He was also desirous of continued protection, and was willing to cooperate in return for such protection [G.A. 457-459, 466, 492]. Also, he wanted to give some information which might lead to the apprehension of his abductors [G.A. 293-295, 307, 417, 495]. These various motives, articulated by [petitioner] himself, demonstrate vividly that it was his gratitude and self-interest, not compulsion, which prompted him to talk to the police. The desire of the police to get as much information from [petitioner] as they could was natural and understandable. [Petitioner] likewise had reasons for remaining.

The record fully supports the determination of both courts below that petitioner's statements were voluntary and the issue does not merit further review.[8] *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[9]

[8]Petitioner also suggests (Pet. 4) that he should have been given *Miranda* warnings prior to his debriefing. Although this issue was raised in the district court, petitioner apparently abandoned it in the court of appeals (Pet. App. 30a n. 16) and accordingly cannot raise it here. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16. In any event, there was no *Miranda* violation, for petitioner was not questioned about a crime he was suspected of committing, and was not in custody when the statements were made. See Pet. App. 30a. Cf. *Oregon* v. *Mathiason*, No. 76-201, decided January 25, 1977.

[9]Petitioner also argues (Pet. 11) that he was somehow "improperly stamped" as a narcotics dealer when the jury "learn[ed] that he had recently been kidnapped for ransom by the Black

3. Petitioner further contends (Pet. 11-14) that the district court erred in admitting evidence that petitioner had not filed federal income tax returns for the years 1969 to 1974.

Petitioner was charged as a major participant in a highly organized, multi-million dollar drug conspiracy. As evidence of his involvement it was permissible for the government to introduce proof that he spent large amounts of money (see *United States* v. *Jackskion*, 102 F. 2d 683, 684 (C.A. 2), certiorari denied, 307 U.S. 635). Proof that petitioner failed to file income tax returns during the relevant period was in turn admissible to negate the existence of any legitimate source for that money.[10] See *United States* v. *Falley*, 489 F. 2d 33, 38-39 (C.A. 2).

Muslims." But the government did not present testimony that petitioner was kidnapped by Black Muslims (see Tr. 4104-4121). Rather, as a predicate for the introduction of petitioner's admissions, the government adduced testimony to the effect that petitioner had been kidnapped, released, and interviewed (Tr. 4102-4103). Petitioner's admissions did of course reveal that he had a substantial involvement in the drug trade, but this revelation came from petitioner's own words, not from any speculative inference that "Black Muslims" only kidnap " 'well-heeled' narcotics seller[s]" (Pet. 11).

[10]Petitioner claims (Pet. 11-12) that there was no evidence to show that he had acquired or spent large sums of money during the conspiratorial period. To the contrary, the evidence showed that, although he had been unemployed since September 1968, petitioner lived in various rental apartments during the course of the conspiracy; that he had purchased and registered a new Lincoln Mark III in 1970; and that he had used a Master Charge Card in traveling to various cities and spent in excess of $3,000 on charges during this time. See Tr. 5814-5815, 5815-5820, 5825-5833, 6007-6010, 6030-6035.

It is true that in *United States* v. *Falley* the government introduced evidence that the defendant had filed tax returns reporting only limited income, while here the evidence was that petitioner filed no returns at all. As the court of appeals correctly ruled, however, this distinction goes to the weight of the evidence, not to its relevance or admissiblity (Pet. App. 24a):

> While proof of non-filing [is] concededly of less probative force than a tax return showing minimal income, there can be little doubt that it does tend to negate the existence of a legitimate source of income. It is hardly conclusive, but it is undeniably relevant. The determination of the weight which might properly be accorded it was for the jury's determination, and they were so instructed. [Petitioner] w[as] free to rebut this evidence with proof that [he] had sufficient prior net worth to fund the expenditures [he] had made, or that [he] obtained the necessary funds through non-reportable, non-taxable sources, but [he] apparently offered no such explanations. We agree with Judge Mishler that the probative value of the evidence outweighed any incidental prejudice * * * .

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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